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.....

IN THE SUPREME COURT OF THE UNITED STATES
March Term, 1998

.....

Francis osei-Afriyie,

Petitioner,

v.

Grace Ampofoh,

Respondent.

.....

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

.....

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
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FRANCIS OSEI-AFRIYIE,
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GRACE A. AMPOFOH,
RESPONDENT

.....

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

.....

RESPONSE TO SUMMARY OF ARGUMENT

I. The trial court did exceed its jurisdiction by indirectly ordering the sale of a non-marital property to satisfy cash payment. Nevertheless, property award must be satisfied out of existing property. *Sidwell v. Sidwell*, 165 A. 334, Del.Super.,(1933), and *Beres v. Beres*, Del. Super., 154 A.2d 384 (1959). The question which arises is this: If the property was not sold, **how** <u>and</u> **when** was respondent to pay petitioner?

II. The non-marital property was not transferred after the trial court's Order. Acceptance of amount adjudged due is not inconsistent with the claim that judgement is not large enough and appeal may be maintained. See, pp.5-7.

III. Petitioner correctly states the trial court's rulings. Petitioner alleged equal protection of the laws and due process violation in his Opening brief,pp.14-15, 18,22 and Reply brief reproduced in its entirety in the appendix to this reply, ATWRB, pp.5a, 12a, 19a-20a. Opening brief p. 22 states:

> Also by denying petitioner a full and fair opportunity to litigate the action, the trial judge denied him due process under the 14th Amendment to the United States Constitution.

IV. Fact witnesses. Testimony from the witnesses would have included facts on the ownership of the Ghana property. Dr. Owusu-Akyaw was an agent of respondent and Ernest was her employee.
Appendix to Delaware brief, pp.189-190.

C. The Petition does not misrepresent the trial court's factual findings.

The respondent ordered supplemental transcript consisting of more than 366 pages. But she makes no reference to pages in the transcript. Instead, she relies on the trial court's erroneous findings of fact and conclusions of law which were the basis of the appeal in the first place. For instance, the trial court found that:

1. Wife was always employed during the entire length of the marriage; appendix

to petition (AP), p.10a. But see appendix to reply brief to this Court. (ATWRB), p.33a. Wife testified that she was unemployed for 7 months in 1984.

During that period, petitioner was responsible for all expenses. Also, throughout the parties' stay in Canada, petitioner was responsible for health and dental care insurance for the family. The premiums were deducted from his salary by the University. Opening brief, p.5.

2. She contributed from the very beginning of the marriage exactly half of all expenses; AP, p.10a. But see AP. pp.60a-61a, and petition, p.7.

3. Wife began working as early as her first day in Canada after coming over from Ghana, Africa. AP. 9a. But see brief in opposition (OB),p.12 (2).

Respondent's defense of the trial court's, Findings, Conclusions and finally Decision and Order was expected. This is because the Decision and Order contained a wholesale adoption of her request in her Rule 52D filing, including her request to permit wife to pay husband any balance deemed owned by the court after sale of Hancock property and distribution of proceeds. ATWRB, 25a-28a,37a-39a.

Contributions made by the parties are stated in Opening Brief, pp.6-10. Wife withdrew more than $4,800. Petitioner's response on cross-examination is found at

AP. 41a-43a. It is important to note that petitioner spent the money left in the joint account on the rental properties.

The trial court's findings and conclusions were not supported by the record and, as a matter of law, the Delaware Supreme Court should have reversed the decision.

D. The Petition does not misrepresent the trial court's application of Delaware law.

The trial court did not adequately and properly consider 13 *Del. C.* 1513. In fact, the trial court failed to comply with its own rulings in the distribution. Petition, p.9.

1. **The Hancock Street Property**

This is addressed below under I.

2. **The Ghana Property**

Petitioner does not argue that the trial court was required to place the burden of proving that the property was marital on respondent. On the contrary, he argues that the trial court denied him a full and fair opportunity to call and examine his witnesses who had knowledge about the ownership of that property. Petition, pp. 19-23. Indeed, it is significant to point out that on direct examination the respondent could not

provide a satisfactory answer relative to the ownership of the property. AP,pp.49a-50a.

REASONS FOR GRANTING THE WRIT

I.

The denial of due process by the trial court when it delayed payment is not moot. Judiciable case still exits.

The general rule is that when a judgement has been satisfied, it has passed beyond review, for the satisfaction thereof is ``the last act and end of the proceeding.'' *Klebora v. Klebora*, 5 P.2d 965, at 969,973 (1st D.Ct of App. 1931). But the settled law is that``where the only question on appeal is whether the recovery should be greater than that allowed by the trial court, the acceptance of an amount adjudged due is not inconsistent with the claim that the judgement is not large enough and the appeal may be maintained. *Clarke v. Angelus Memorial Association*, 58 P.2d 974, 975 (2d D.Ct of App. 1936); Also, see *Harrold v. Harrold*, 224 P.2d 66, 68 (1950) in which the court stated that it was not the from the judgement in her favor that wife appealed, but from that portion of the judgement denying her the full relief requested.

In the case at bar, petitioner indicated in his brief to the Delaware Supreme Ct. p.16, that he had submitted his request in his Family Court Rule

52(d) filing, pointing to the appendix, A3-A17. He stated that his request included (1) division of the 4 rental properties, the marital home and the house in Ghana; (2) distribution of net rent from the rental properties; (3) division of personal property, (4)accrued expenses on the marital home and (5)attorney's fees. He also pointed out later that he had requested reimbursement of Mr. Owens' fees. See ATWRB, pp.30a-32a.

Again, he indicated in his reply brief to the Delaware Supreme Court that the trial court distributed only the 4 rental properties and the marital home. See AP, p.15a, Exhibit A. He also pointed out that the trial court failed to at least consider respondent's monetary contributions which the court ruled it would do. AP. 54a-55a. Therefore, considering the above only, a justiciable case or controversy still exits and the parties ``continue to have a`personal stake in the outcome' of the suit.'' *Lewis v. Continental Bank Corp.* 494 U.S. 472 (1990) at 477-478.

Furthermore, respondent had requested in her Rule 52D filing that the court delay her payment of any balance deemed owed until the sale of the Hancock property and distribution of the proceeds. ATWRB, p. 28a. That request was granted to the detriment of petitioner. Petitioner lost the use of his funds due

him for 9 months and had to pay exorbitant interest on an amount he borrowed from a bank. Hence, he has suffered an actual injury traceable to the respondent which is likely to be redressed by a favorable judicial decision. Lewis, id., 477.

Considering everything in the context of the record, and petitioner's reliance on *Lewis*, *Klebora* and *Harrold, ibid.*, a judiciable case or controversy still continues and the writ must be granted.

Also, the writ must be granted because a spouse's acceptance of payments under the alimony, property settlement, or child support provisions of a decree judgement was held not to estop him from seeking a more favorable award on appeal where the other spouse failed to cross appeal altogether or with respect to the correctness of the award accepted. See for instance, *Marshall v. Marshall*, 364 P.2d 891 (1951, Okla); *Hofer v. Hofer*, 415 P.2d 753 (1966, Or); *Hancox v. Hancox*, 203 NE.2d 613 (1964, Ill) and *Cohen v. Cohen*, 228 P.2d 54 (1951, Cal).

II.

PETITIONER DOES NOT MISSTATE THE STATE COURTS' RULINGS AND DID PROPERLY RAISE HIS CONSTITUTIONAL ARGUMENTS IN THE STATE COURTS.

The response to respondent's argument about misstatement on the Ghana property has been addressed above under D(2), p.4.

Pension, deferred compensation accounts, bank account balances, etc.

The trial court's rationale for refusing to apply a 50/50 division to those accounts is found at AP. 13a-14a. However, this rationale was derived from respondent's request stated in the appendix to this reply brief, ATWRB, pp. 38a-39a. Put briefly, ``...Mrs. Ampofoh should be awarded greater than 50% and the way to accomplish that is to award her the balance in the accounts that she herself saved. She was more frugal than Mr. Osei-Afriyie.'' This is not so much a legal argument but rather it is an invitation to ignore the law and indeed she succeeded in doing that.

But the Delaware Legislature has stated in language too clear to be misunderstood that ``all property acquired by either spouse during the marriage, regardless of how such property be titled is ``presumed'' to be marital property, subject to division by the Family Court upon divorce. 13 *Del. C.* Sec. 1513(a)(c). Sec. 1513(b), however, provides 4 exceptions as enumerated in the Petition, p.12. The burden of proving exclusion from division falls on the proponent. Consistently, this mandatory statute has been construed and applied for several

years by Delaware courts. See Petition, p. 13. Additionally, Delaware courts have stated that control or management of a marital property by individual spouse does not determine its disposition. Petition, p.13.

The trial court's rationale ignores the specific mandate of 13 Del. C. Chapter 15 and to that extent amounts to a judicially legislated repeal of those sections. It is fundamental that the courts should not substitute their standards of social policy for those of the Legislature. In the present situation, the body has cleary stated all marital property must be divided by the Family Court with a few enumerated exceptions. If the social policy of the State of Delaware should be to exclude marital property under the control and or management of an individual spouse from division, the remedy is for the Legislature to amend 13 Del. C. Chapter 15.

III

DUE PROCESS RIGHTS DENIED WHEN PETITIONER WAS NOT ALLOWED TO CALL AND EXAMINE HIS WITNESSES.

There are exceptions to court rules and the Sixth Amendment to the U.S. Constitution. Due to page limitation and also in the interest of brevity, petitioner's response is found in the appendix to this reply brief, pp.8a-13a.

Furthermore, respondent only quotes a portion of note 2 from *Murphy v. Tivoli Enterprises*, 953 F.2d 354, 358-359, (8th Cir. 1992). It continues, `` State courts have permitted telephone testimony only under special circumstances, or when the parties have consented.'' Quoting Ferrante by Ferrante v. Ferrante, 485 N.Y.S.2d 960, 962(1985).

Finally, petitioner relies on United States v. Weber, 437 F.2d 327 (1970) for the citations therein on cases about the Sixth Amendment exceptions. Among them is *Dowell v. United States*, 221 U.S. 325, 330 (1911). In Dowell, this Court said:

*** this general rule of law [the right to confrontation] embodied in the Constitution***, and intended to secure the right of the accused to meet the witnesses face to face, and thus sift the testimony produced against him, has always had certain well recognized exeptions.''

CONCLUSION

The petition for a writ of certiorari should be granted.

Respecfully submitted,
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May 1998

APPENDIX TO REPLY BRIEF

(ATWRB)

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ARGUMENTS

RESPONSE TO ANSWERING BRIEF ARGUMENT I.A.

The Respondent fails to understand the legal argument. The argument is not about the fact that the trial court did or did not abuse its discretion. Rather, it is about errors in the application of the law. Two legal errors are raised which respondent fails to address. These are:

(1) Delaware law requires that in property division following a divorce, when one party wants an asset acquired during marriage excluded from division, the trial court **must** inquire whether that asset falls within any of the four statutory exclusions enumerated under 13 *Del. C* Sec. 1513(b). In this particular instance, the trial court failed to do that and hence an error was committed.

Respondent contends that``What the Trial Court did was to distribute and assign those assets in a way that was unsatisfactory to Appellant.'' Answering brief (Ans.B), p.9. One only needs to read the court's June 6, 1997 Order. A27-A36. Therein, the court lists the marital assets at A27 through A30. These assets include pension and deferred compensation plans, motor vehicles and bank accounts. A29. The court also concludes:

> Husband is requesting a 57%-43% division of the marital estate in his favor. Wife is requesting a 50%-50%

division. ...Based upon this unique arrangement that existed between the parties during their entire marriage and the comparable current economic situations, it would be inequitable now to divide the marital estate other than through a 50/50 division. **Accordingly, the marital estate is divided as set forth in the attached `` Exhibit A''.** (emphasis added). A34.

Exhibit A is found at A36.

Clealy, an examination of Exhibit A **does not** include pension and deferred compensation plans, motor vehicles and bank accounts which the court had listed as constituting a part of the marital estate. However, in order to exclude those assets from division, the burden was on respondent to show that they fell within one of the four statutory exceptions and were, therefore, not subject to division between the parties. *Gregg v. Gregg,* Del. Supr. 510 A.2d 474, 478. The trial court failed to require respondent to carry this burden as it was required to do under guideline number 3(a) established by this Court in Husband R.T.G. v. Wife G.K.T.,Del. Supr., 410 A.2d. 153, at 159. Obviously, the trial court did not follow guidelines and the law.

(2) Also, under Delaware law, the fact that an individual spouse may have control over marital property, and thus

determine its placement into either a joint or separate account, or into other property, is not dispositive of the legal issue of its characterization for the purposes of property division. *Halsey v. Charlotte*, Del. Fam. Ct., 419 A. 2d 962, (1980) at 965. Respondent does not address this law. However, the trial court distributed the marital estate based upon management and control contrary to the law. That too was an error.

Respondent concedes paragraph 6 contained in her 52D is incorrect. She now admits, ``Initially Appellant contributed more towards these expenses... The parties' contributions to specific household expense was not always equal...'' Apart from the marital home to which she contributed over $2,000 more than petitioner, she does not specify which household items or other real estate she made more contributions than petitioner. Indeed, there is none. Also, for the most part, she does not deny petitioner's statement of fact as stated in his opening brief, pp.3-11. Therefore, the court's findings in opening brief, p.31 is incorrect.

Petitioner never suggested that the parties shared expenses 50/50. A71. Neither did he keep obsessive watch at expenses. In fact, not only did he spend more money on all expenses, he also bought a car to transport respondent to work. A126.

MR. OSEI-AFRIYIE: Did I have a car before you came to Canada?
MS. AMPOFOH: No.
MR. OSEI-AFRIYIE: When you were on day shift did I have a car while we used to live at Simon Fraser University?
MS. AMPOFOH: Well you bought a car because you got tired of walking me down to the hill. So you bought a car but I really don't know what is that month you bought a car.
MR. OSEI-AFRIYIE: So I bought the car to use for the purpose of transporting you to work and picking you up?
MS. AMPOFOH: I wouldn't say a hundred percent. You bought it and used it to.
MR. OSEI-AFRIYIE: Did I ever drive you, pick you up from Hampton Court or (unable to hear word) first im my own car and then in your car?
MS. AMPOFOH: Yes.

It should be noted that the expenses on petitioner's car were paid by him. They included insurance, sales tax, maintenance, registration and gasoline.

RESPONSE TO ANSWERING BRIEF ARGUMENT I.B.

Ancillary to the Family Court's general power, it may divide marital property, award alimony, and grant attorney's fees sought by the parties. 13 Del. C. Secs.

1512, 1513 and 1515. This Court stated in Husband, id., (1979) at 159 that the Family Court shall act only ``upon request of either party.''

In the case at bar, petitioner's request is stated in his opening brief, pages 17-18. The court's Order does not address petitioner's request for attorney's fees and costs. Instead, the trial court granted respondent's request on the **Hancock property**, a non- marital asset. Respondent's check was returned to her pending the outcome of the appeal in this Court. See Appendix to Petitioner's Reply Brief, A (R.B.) at 1. She knew her request was against the law. Here, we are dealing with the conduct of the trial court on a non-marital property. Hence, respondent should not be permitted to rush to pay petitioner a disputed amount on the day her answering brief was due in order to correct the court's improper conduct. Whether or not such conduct violated petitioner's guaranteed **constitutional right to be notified** and given an **opportunity to be heard** before judgement on the **Hancock property** is for this Court to decide . Accordingly, the issue is not moot. It is still alive.

Ghana Property

Respondent testified about the land as follows:

MS. AMPOFOH: ``... So my brother and me we started sending home money to my dad and my dad acquired the land...'' A88.

The above should be read in conjunction with petitioner's unrebutted testimony on how Ghanaians abroad acquire properties in the villages through their relatives who live in Ghana, A94-A95 and why respondent's parents were divorced, A101.

Marital Home/Rent and Expenses.

Rental income was resolved in court. It was established that respondent had positive rent income on all the properties. A141. However, although put on notice, she failed to bring receipts for her expenses to the courtroom. A144. Whatever expense receipts she had were attached to petitioner's April 30, 1997 letter to the court. A199-A204. The trail court never relinguished its responsibility to oversee the division of the rental income and expenses. Opening brief, pp.19-20; A(R.B), P.2.

RESPONSE TO ANSWERING BRIEF ARGUMENT II.

The parties had agreed for the Trial Court to consider the capital gains tax consequences on the rental properties. A49. Respondent does not point to any part in the record where the parties agreed that transaction costs should be considered on the marital property. The agreement was on capital gains tax consequences on the rentals which the court correctly stated was applicable. However, the court used its discretion to exclude the tax consequences. There was no speculation about the capital

gains tax. It was established by law to be 28% at that time. By respondent's reasoning, everything passed by Congress and established as law is speculative because it is subject to change. Income tax rates are also speculative and courts should ignore them. Obviously, that reasoning does not make sense.

RESPONSE TO ANSWERING BRIEF ARGUMENT III.

The record at A77-A79 or B33-B34 reflects the following:
THE COURT: The 52D the petitioner filed indicated that the testimony would be with regard to ownership and the value of the property. Is that what you are offering his testimony?
MR OSEI-AFRIYIE: Yes, Your Honor, he's going to indicate his conversation with Grace about the ownership of that property...
THE COURT: Well what would be the nature of this testimony be?
MR OSEI-AFRIYIE: I, the person is going to testify to the fact that there was conversation between him and Grace about the ownership of the property...
THE COURT: Which of the two witnesses you suggest in your 52D would be offering this testimony?

MR. OSEI-AFRIYIE: Dr Michael... He has knowledge that the property belongs to Grace...

Respondent again only quotes part of the record from the September 11, 1996 letter to Ms. Vari and fails to mention the sentences immediately preceding the quoted portion which are:

(4) I intend to call the following persons who were physically/ personally involved in Ghana in building the house to testify about the ownership of the property in Ghana:

(a) Dr. Michael Owusu- Akyaw, Ph.D.

Dr. Owusu- Akyaw will testify that Grace told him in November 1993 that she was building a house for herself in Nyinahin, Ghana. A189-A190.

Thus Dr. Owusu-Akyaw was to testify about the ownership of the Ghana property based on his knowledge and fact. He was also to testify about the value of the property based upon his experience and knowledge, and fact. His testimony would not have been cumulative. Petitioner did not testify about his opinion about property ownership in Ghanaian villages. He testified about his experience and knowledge concerning how property is acquired in the villages and about the fact that respondent had told him she owned the property. A66. This was unrebutted.

Rules of Evidence and Agreement

Respondent is under the impression that there are no exceptions to rules of

evidence. However, under Delaware Rule of Evidence (D.R.E.) 804(a)(5), unavailability as a witness includes situations in which the declarant:

> Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

In determinng whether the trial court abused its discretion, it is necessary to examine the facts in each case. Younger v. State, Del. Supr., 496 A.2d 546,550 (1985). In the instant case, the following facts are relevant:

(1) The witnesses are in Africa which is thousands of miles away from Delaware.

(2) The trial Court on July 3, 1996 stated that in view of the fact that the amount in controversy was small, it would not be prudent to bring any witnesses from Ghana.

(3) Following the July 3, 1996 hearing Ms. Vari wrote to petitioner and suggested allowing telephonic testimony from Ghana. A188. Petitioner agreed. A191.

(4) Upon receipt of petitioner's response, Ms. Vari called him to clarify what he meant by ``I do not, however, agree that you can call anyone to testify on your client's behalf.'' Petitioner told her that she could not call anyone from the street to testify. But anyone she called should have knowledge about the ownership of the Ghana property. Ms.

Vari agreed and told petitioner that she would send him the names of the witnesses and a description of the nature of their testimony. Petitioner did not hear from her after a long period of waiting. The lack of response prompted petitioner to remind her in a subsequent letter. A196, last paragraph. Ms. Vari **NEVER, NEVER** responded.

(5) Petitioner contacted his witnesses and was unable to obtain their presence in Delaware.

(6) The witnesses were beyond the supoena power of the trial court.

(7) The witnesses agreed to testify by phone from Ghana.

(8) The trial court and respondent were informed about paragraph 7 days before the trial.

(9) The trial court and respondent were again informed through petitioner's 52D.

> Husband will arrange to have Dr. Michael Owusu-Akyaw and Ernest testify by phone from Ghana about the ownership and value of the property in Ghana.

(10) Respondent did not oppose it in her 52D.

(11) The trial court brought a telephone into the courtroom.

(12) Written statement from Dr. Owusu-Akyaw about the ownership of the Ghana property was on record months before the trial. A183.

There was an agreement to allow telephonic testimony. Moreover, this Honorable Court has stated that a determination of whether the witness is unavailable rests within the sound discretion of the trial court. Younger, 496 A.2d at 551. In this case, the record reveals the court found that the declarants were unavailable. Hence, it would have put form over substance to have asked petitioner to attempt to contact those people where it was highly unlikely they would have voluntarily appeared and they were beyond supeona power of the court. Therefore, discretion is abused by denial ``when there is reasonable probability that substantial prejudice may result from a ... trial.'' Bates v. State, Del. Supr., 386 A2d. 1139, 1141 (1978).

Respondent argues that the Court indicated that telephonic testimony is ``...fraught with peril because of the reasons...stated on the record yesterday.'' Those reasons, according to respondent, ``included concerns about the proper administration of oath, the effectiveness of cross-examination and what effect of sworn testimony is in Ghana.'' Answering brief, p.32. This Court may want to question whether Ms. Vari did not know the ``peril'' when she suggested allowing telephonic testimony.

Petitioner recognizes that the effect of the Confrontation Clause is to provide an accused with certain protections at

trial: witnesses must testify under oath; the accused can cross-examine the witnesses; the jury can observe the witnesses' demeanor. California v. Green, 339 U.S. 149, 90 S.Ct. 1930, 26 L.Ed. 2d 489 (1970). However, *Green* does not overturn the established law that the Sixth Amendment permits the introduction of evidence through some exceptions. As the 3rd. Circuit stated in United States v. weber, 437 F.2d 327, at 339:

> `` ...We do not read *Green* to mean that an accused must have the benefit of such protections even when it is physically impossible for the Government to bring the witness to trial.''

Therefore, under the circumstances and considering the futile efforts made by petitioner to bring his witnesses from Ghana, the denial by the trial court to allow telephonic testimony was an abuse of discretion. Petitioner was, therefore, denied due process of law and a full and fair opportunity to litigate the issue. This resulted in substantial prejudice against petitioner.

Contributions as gift

It was respondent's burden to prove her contributions to the Ghana property were a ``gift'' to her parents. Respondent did not introduce any evidence to show disclosures were made to the Internal

Revenue Service that the contributions were a ``gift''. She also did not show any evidence that her parents paid gift taxes on the sums so received. See Schumeusser v. Schmeusser, Del. Supr. 559 A.2d 1294, at 1300.

RESPONSE TO ANSWERING BRIEF ARGUMENT IV.

Respondent now agrees with petitioner that the parties did maintain **joint** and **separate** accounts. Petitioner's argument is that the funds in all accounts are marital and that was why he spent more money to acquire the 25 and 17 Spruance properties. He also spent funds from his accounts to install fence on the 13 and 15 Spruance Road properties, A150, and to repair all the properties, A150. Petitioner also bought the mower and the funiture in their marital home in 1988. Brief p. 7. Again, in February 1985, he withdrew the proceeds from the sale of the Nissan he had purchased from Brussels, Belgium in December 1979 for $8,000 and gave the money to the maternal grandparents to be spent on the children. The Nissan was a non-marital asset. The children were supposed to stay with the grandparents for more than a year but they caught malaria and petitioner had to go and bring them back to the U.S. in July 1985. Brief pgs.6 & 7.

The parties bought their first rental property in May 1991. The last one was acquired in September 1992. From May

1991 until March 1996, the parties jointly managed the properties with petitioner shouldering a disproprtionate share of the burden physically and financially. Even when respondent unilaterally took control of collecting the rent and depositing it into her individual account, petitioner continued to spend money from his individual accounts to maintain and repair those properties. A7-A11. An example is the payment of May 1996 mortgage on the 17 Spruance Road property by petitioner when she was ``managing'' all the properties and there was no tenant in that property. Petitioner had asked her to use the balance of the positive net rent income from the other properties to pay that mortgage but she refused. Although she refunded half to petitioner from the rent she collected from the next tenant, the half paid by petitioner came from his account while rent coming to him was zero. On the contrary, the half paid by respondent came from the joint rental income. Petitioner again spent money from his account for expenses on 17 Spruance Road in September and October 1996, A9, when supposedly she was the sole `manager' of that property and she collected the rent and deposited it into her individual account. This conduct of petitioner by his actions towards 25 and 17 Spruance properties meant joint management by both parties.

Respondent's response that she paid petitioner the same amount she had withdrawn from the joint account in violation of 13 Del. C. Sec. 1509(a)(1) is incorrect. Indeed, upon cross-examination, petitioner stated that respondent withdrew more than half and whatever money remained in the account he spent it on the rental properties. A(R.B)3-4; supplemental transcript, pp.66-67.

Counsel's statement that he corrected the discrepancies in Rule 16 report (prepared by respondent) and Rule 52D report (which he prepared) is **FALSE**. In the Rule 16 report, A212, respondent lists her account balances totalling over $27,000. During discovery, it was discovered that the balances totalled more than $37,000. A summary of her balances was stated by petitioner in his 52D. Also see A175-A179. Counsel received a copy of petitioner's 52D before he prepared respondent's. Counsel also had A175-A179 with him because those pages originated from his office. Respondent's 52D is at A25. Counsel lists the following account balances for respondent:

Wilmington Trust CD	$10,155
PNC Checking	$1,988
PNC Saving	$2,810
	.....
TOTAL	$14,953
	.....

At trial, the court found respondent's account balances totalling over $38,000, at A30. This is more than two times the amount counsel states in his 52D. It is important to note that counsel, at B4-B10, does not specifically point out how he corrected respondent's discrepancies. Petitioner proved at trial that there were omissions by counsel and showed evidence to the court as indicated at B8-B9, hence the court's findings at A30.

Also in respondent's 52D, counsel included some equity loans on the marital home and the 17 Spruance road property. These equity loans did not exist. Counsel **points to NO EVIDENCE** from the record where he corrected respondent's numbers to arrive at those loans. Does he know the loans on the properties more than the owners who pay the loans? He also reduces the amount of money petitioner contributed towards the acquisition of the marital home and increases respondent's contribution. Lastly, petitioner does not have a Ph.D. B-1. He stated that he had completed Ph.D. coursework. Completion of coursework does not lead to the award of a Ph.D. The candidate has to write and pass comprehensives. After that he/she has to write a dissertation, defend and pass it. It is obvious that had petitioner died before this case went to trial, the numbers would have been skewed in such a way that his heir would probably have inherited negative asset and owed

respondent. Petitioner is glad he is alive.

Respondent concedes the trial court was wrong in stating that the Board has been subject to **several** earlier sunset dates. Presumably, this time counsel read the history of Chapter 93 of Title 16 which he did not want petitioner to state at trial.

Counsel's description of the parties' duplex is wrong. 13 and 15 Spruance Road were previously owned by two separate individuals; 13 was owned by Mr. Herbert Lubitz from Wilmington, Delaware and 15 was owned by Mr. Martin Bernadinis from Pennsylvania. They used to manage their units individaully. Each unit has its own separate utility meters. Did counsel contact the City of Dover before he wrote the answering brief? Each unit has its own roof. Repairs are done separately. There is a solid wall separating the units. Did counsel consult his client before he wrote this? The duplexes on Spruance Road are not like old houses that have been converted into two -family dwelling units.

RESPONSE TO COURT ORDER

The trial court also issued a second Order on November 15, 1996. Docket entry, A2. Respondent did not fully comply with that Order. She refused to provide

documentation on one Wilmington Trust account. See A185-A186, A191, A194-A197.

March rent check and control

Petitioner mentioned the March 1996 Delaware Housing Authority (Section 8) rent check for 13 Spruance Road property to show control in the relationship. In fact, as a further manifestation of this control, see A151-A152. Therein, respondent indicates that she be awarded 153 Royal Grant Way property because she paid more of the downpayment. But she did not want petitioner to be awarded 25 Spruance Road property even though he paid more of the downpayment on that property.

Why is it **equitable** to award the marital home to respondent because she paid more of the downpayment **but inequitable** to award 25 and 17 Spruance Road properties to petitioner because he paid more of the downpayment on those properties? Lastly, why is it **inequitable** to award petitioner **57%** of the marital estate because he spent a disproportionate amount of his resources (physical, financial and mental) to acquire, preserve and maintain all the marital assets?

CONCLUSION

This Court has long recognized that a Family Court Judge works under very difficult circumstances, but cautioned against misuse of power stating:

> The court and its power are solely the result of statute, and when proceeding on what is perceived to be an equitable basis, the trial judge could not do so in disregard of the law or in violation of the rights of the litigants. Abel, G.S. v. Badrban, H.K., Del. Supr., 453 a.2D 94, 97 (1982).

Furthermore, while recognizing that the impact of the Family court's order on the future life of former spouses as they go their separate ways after days or decades of marriage can be enormous, this Honorable Court gave the following warning:

> It is, therefore, essential in the public interest that Judges of the Court who exercise its statutory power...apply the same basic approach in the administration of Sec. 1513. Husband, id., 410 A.2d 153, at 158.

If a Family Court Judge fails to to the above, this Court stated:

> ``... We cannot avoid our responsibility for consistency in the administration of the law.''

For reasons expressed and upon the authorities herein, petitioner requests nothing more or nothing less than consistency in the administration of the law.

Francis Osei-Afriyie
P.O.Box 185, Dover, DE 19903-0185
Petitioner-Below,Appellant
Pro Se
Dated: 12/3/1997

IN THE FAMILY COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

FRANCIS OSEI-AFRIYIE,	:	
Petitioner,	:	Petition No.
v.	:	95-13580
GRACE A. AMPOFOH,	:	File No.
Respondent,	:	CK95-3472

RULE 52

COMES NOW, GRACE A. AMPOFOH, ``Wife'' by and through her attorney, Gerald I.H. STREET, ESQUIRE, who submits the following in compliance with Family Court Civil Rule 52.

I. PROPOSED FINDINGS OF FACTS, CONCLUSIONS AND SUPPORTING REASONS

A. Statutory Factors Set Forth Under 13 Del. C. Sec.1513 are as follows:

1. The length of the marriage.

The parties were married on February 10, 1980. They separated on or about January 1, 1995. A final decree in divorce was entered on August 3, 1995, whereby the parties were married for a little over 15 years.

2. Any prior marriage of the parties.

Neither of the parties had previous marriages.

3. The age, health status, amount and sources of income, vocational skills, employability, estate liabilities.

Francis Osei-Afriyie, ``husband'' is 49 years of age. He has a Ph.D. in Economics and an MBA in Health Care. Husband has been employed at the State of Delaware's Bureau of Health Planning and Resources Management since 1988. Huaband's present monthly gross income from employment only is approximately $3,000.00

Wife is 45 years of age and suffers from numerous health problems, the most serious of which is that she is diabetic and is insulin dependent. Additionally she has been diagnozed with degerative arthritis.

Wife is a RN and has worked during the marriage as a nurse. She is presently employed by the State of Delaware at the Hospital for the chronically Ill and has a present monthly gross income from employment only of approximately $3,500.00

4. Whether the proposed award is in lieu of or in addition to alimony.

Neither party has requested alimony.

5. The opportunity of each for future acquisitions of capital assets and income.

The parties are in relatively equal circumstances at this time, ref the opportunity of each for future acquisitions of capital assets and income.

6. The contribution or dissipation of each party in the acquisition, preservation or appreciation of the marital property including the contribution of a party as a homemaker or husband.

(a) At the very beginning of their marriage husband announced that wife was expected to earn her own income, and to support herself by paying (1/2) of all joint expenses. They have shared routine monthly living expenses and the cost of capital acquisition this way to the present date. They even acquired another property - post divorce, jointly by each contributing (1/2) of the purchase price and settlement costs.

(b) The one exception to this procedure was the marital home; 153 Royal Grant Way. The full downpayment of approximately $10,000.00 was provided by wife from her individual savings while the settlement costs of approximately $2,500.00 were paid by husband. Thereafter, the expenses to maintain and

repair the house were shared equally. Therefore, each should be awarded an amount in proportion to their initial, abeit unequal contribution of 75%/25%.

7. The economic circumstances of each party at the time division of property is to become effective.

As stated above, the economic circumstances of each party are relatively equal.

8. Whether the property was acquired by gift, except those gifts excluded by Sec(b)(1) of this Section.

Husband is expected to claim that property in Ghana is marital. Wife will refrain at this time, from explaining her opposition in detail, except to say that any contributions she made to land in Ghana was from her individual funds (see par. #11) with husbands knowledge years before their divorce, without any opposition from husband and was intended as a gift to wife's father.

9. The debts of the parties

Debts are set forth on the attached Exhibit ``B.''

10. Tax consequences.

Both parties agree that capital gains tax consequences and sale sale costs should be taken into consideration on all real properties.

11. Other considerations

(a) Both parties made contributions to their pensions, but, because their salaries were not exactly equal, in unequal amounts as required by State pension laws. However, the unequal amount of contributions made by each party to their deferred compensation accounts, was pursuant to their own choice. Wife chose to save more and since she suffered the consequences of her frugality once, she should not have to pay any portion to husband who chose not to be frugal.

(b) Divide household furnishings using the two list method.

II PROPOSED ORDER

Taking into consideration the statutory factors set forth in 13 Del.C Sec. 1513, it is hereby ordered as follows:

1. Award the marital home to Respondent, but give credit to Petitioner of 25% of the net equity, as well as #17 and #25 Spruance Road and she will accept complete responsibility for the payment of all mortgages, debts and liabilities associated therewith;

2. Award #13 and #15 Spruance Road to Petitioner and he will accept complete

responsibility for the payment of all mortgages, debts and liabilities associated therewith;

3. Award Petitioner an amonut necessary so as to balance the net values of the rental properties;

4. Each party to retain 100% of their own pension and deferred compensation plans;

5. All bank accounts should be awarded to the person in whose name the account is titled and no credit given to either to equalize the account balances. All accounts with the children's names should be joint accounts under both parties' names.

6. Each party to retain the automobile they are presently driving and be responsible for any indedtedness or liability associated therewith;

7. Respondent to waive any interest she may have in 24 Forest Drive and Petitioner to waive any interest he may have in Respondent's Father's property in Ghana;

8. Petitioner to pay Respondent the sum of $2,500.00 for reimbursement of attorney's fees.

TWILLEY & STREET, P.A.

BY: /S/.....
Gerald I.H. Street
Attorneys for Respondent
426 South State Street
P.O.Box 1366, Dover, DE 19903

Dated:

SCHEDULE OF ASSETS

ITEM #	Property Description	Fair Market Value	Husband	Wife
1	Marital Home:			
	153 Royal Gt.Wy.	$128,000		
	PNC Mtg	-$68,869		
	Equity Line	-$12,584		
	Transactions costs	-$8,960		
				$29,920
	Subtotal		0	$29,920
2.	Rental properties:			
	13 Spruance Road (Sp. Rd.)	$60,250		
	Boatman Mtg.Co.	-$31,897		
	Tax & trans.costs	-$10,399.17		
			$17,959.83	0
	15 Sp.Rd	$60,000		
	Fleet Mtg. Co.	-$32,587		
	Tax & trans costs	-$7,975.67		
			$19,437.33	0
	17 Sp.Rd.	$65,000		
	CoreState Bk. Mtg	-$49,259		
	Corestate Equity	- $2,200		
	Tax & trans costs	-$11,200		
			0	$2,341

ITEM #	Property Description	Fair Market Value	Husband	Wife
	25 Sp. Rd.	$60,000		
	Wells Fargo	-$40,209		
	Tax & trans costs	- $7,239		
			0	$12,252
	Subtotal		$37,397.16	$14,593
	GRAND TOTAL		$37,397.16	$44,513
3.	Deferred comp.		$7,470.69	$13,400
4.	Household furnishings		----	----
5.	Motor vehicles:		$4,725	$4,726
6.	Bank Accounts:			
	a. PNC (#D615617)	$10,000		
	b. PNC - Cking	$3,558		
	c. Merrill Lynch	$5,096		
	d. Mellon Bank	$5,145		
	e. WTrCo. CD 0057533638			$10,155
	f. PNC (Cking #5601005395)			$1,988
	g. PNC (Svg #5701005392)			$2,810

Permit wife 3 months after sale of Hancock property and distribution of proceeds tc pay husband any balance deemed owed by the Court.

EXHIBIT ``A''

13. (k) The value of property set apart to each party.

Husband requests 57/43 allocation of the marital assets in recognition of Wife's superior income and earning capacity, uncertain future employment, multiple medical conditions and future escalating medical expenditures.

ORDER

Based upon the foregoing Findings and Conclusions, IT IS ORDERED as follows:

1. Marital real estate shall be valued and distributed taken into consideration section k and as seth forth below:

Wife shall keep the following real estate:

a. The marital residence located at 153 Royal Grant Way.
b. 13 Spruance Road rental property.
c. House in Ghana.

Husband shall keep the following real estate:

a. 25 Spruance Road rental property
b. 17 Spruance Road rental property
c. 15 Spruance Road rental property

2. Wife shall first select the items she wants to keep from the list on pages 13

and 13(a) of the Joint Asset Report. Husband shall then select what he wants to keep from the remaining items. Whatever is left shall be sold. Section k allocationshall apply.

3. Other assets including automobiles, bank accounts, deferred compensation and pension shall be divided considering section k allocation.

4. Considering section k allocation and depending on which items Wife decides to keep, Wife shall pay Husband $.....

5. Each party shall execute any documents necessary to implement this Order.

BY: /S/.....
FRANCIS OSEI-AFRIYIE
(PETITIONER)
P.O. BOX 185
DOVER, DE 19903-0185

.....

MR. OSEI-AFRIYIE:... The respondent wants to be awarded 25 Spruce Road and 17 Spruace Road for the simple reason that we have been managing those properties separately. Indeed I don't have to go through this but I can tell the Court that that was'nt my choice. But I didn't have anything to do with it because if I objected to it (unable to hear words). So management that's not mean ownership. The

mere fact that you manage a property doesnt't mean that you have the legal right to have it. I am (unable to hear words) asking the Court to award me, award the petitioner his legal expenses and his fees to Mr. Owens. And the reason is the parties met and the $128,000 was put on the table. The respondent was given a copy of the appraisal and the (unable to hear word). The respondent did not accept the appraisal. Consequently, petitioner hired Mr. Owens and paid him $300.00 to be here just for the respondent to back on the (unable to hear word) and to say that now won't accept $128,000.

MR. STREET: Your Honor, I'm gonna object to any further or any further argument about this. This is beyond the scope. This is rebuttal which is beyond the scope. But more importantly, the rule 16 report neither party requested attorney's fees. I noted that and that's why you did not find me arguing for attorney's fees. I believe the Court practices that it can't be brought up at this point.

MR. OSEI-AFRIYIE: Your Honor, I believe in closing of case a party can ask for in Delaware' Code Section 1515 (unable to hear word) provided that after considering the financial resources of both parties the Court may order that party to pay all or part of of the cost to the other party of maintaining or defending in a proceeding under 13. In addition, the Delaware Supreme Court has

ruled that the Court may also order a party who has been (unable to hear word) or unreasonable to pay a portion of the party's fees. There were attempts set on this case. There were also correspondence between...

THE COURT: There is objection on the floor and this a rebuttal. It is beyond the scope of rebuttal. I certainly can't consider anything outside of the record. I will take into consideration representations that were made this morning with regard to how it is Mr. Owens got here and under what circumstances he got here.

MR. OSEI-AFRIYIE: And , Your Honor, you, the Court may also want to consider that that is on record the fact that the petitioner promptly responded to all the discovery materials to the respondent. But the petitioner had to file two motions here because no matter in all his efforts were turned onto deaf ear. And it has been frustrating to the (unable to hear words) and as you so the last letter I send to the respondent's attorney was not even responded to. And I think they have been unreasonable to me and they have listed my resources and I believe taking the law into account I deserve to be reimbursed. And lastly, the Court should consider that 13 Delaware Code 1513 actually itv says a marital property is established on the day of marriage. Whatever you acquired is put into the marital pot. And in that is included

pensions, paychecks, savings and whatever. So the argument that one person had been frugal which is not true because I have contributed to the best of my ability should not be taken seriously. The law is the law. And the law should guide the decision of this Court. Thank you very very much.
THE COURT: Thank you very much. Alright I'll this matter under consideration.
.....

MR. STREET: And the bills, the other bills you split. Now after you worked at Queens Park for about how long, you already told us. I'm sorry. I think we're up to about 1984 and where did you work next?
MS. AMPOFOH: I didn't work from then because I had cesarean section with Monica, was premature. So seven months I wasn't working.
.....

Mrs. Grace Osei-Afriyie
153 Royal Grant Way
Dover, DE 19901
June 11, 1993

Dear Mr. Sarfo:

It shouldn't surprise you to hear from me at this period in time of our lives. I had wanted to write earlier after Osei-Yaw came from Ghana. I am expressing my sincere thanks and gratitude to you for your assistance in Osei-Yaw's father's funeral. I knew, and

Osei-Yaw's father's funeral. I knew, and I told Yaw that you will be there for him. I don't know your mailing address so I decided to write to mother and enclose yours for hand delivery. I would like you to write to me as soon as possible.

Kwame, I have been strongly advised by Osei-Yaw to contact you for assisting me to complete my house in Nyinahin. You have to help my mother to have a place to stay. I shall be sending you money if you offer this important help in my life. My 2 daughters want to visit Ghana, but you and I know, I don't have a room in Nyinahin for even a night. Osei-Yaw suggested your brother is a bricklayer and that we can use him to help. What do you think? My father started the house but couldn't complete it probably due to physical weakness. Cantact him and motherfor where the house and the land are, and we can start from there. I need``toilet'' like Dante's toilet for his mother's house. Yaw wants you to contact Dante for advise.

Kwame, write soon to let me know if you can offer your time for me in this project. How is your wife(my cousin) and the children? How many children do you have at present? God bless and guide you in life and all your undertaking. Ending with greetings from all of us to you all.

Yours Grace.

To: From:

Mr. Kwame Sarfo. Atea, U.S.A.

(Nkwanta)

.....

MR. STREET: The first incident you talked about involved a suitcase of clothes.
MR. OSEI-AFRIYIE: Yes.
MR. STREET: For a daughter that turned out not to be your daughter?
MR. OSEI-AFRIYIE: Yes.
MR. STREET: Are you asking the Court for compensation for the value of that suitcase?
MR. OSEI-AFRIYIE: That yes, that should be included because we all bought the clothes.
MR. STREET: And this was done in February of 1985?
MR. OSEI-AFRIYIE: Before February but I took them to Ghana in February'85.
MR. STREET: Did you bring the clothes back with you?
MR. OSEI-AFRIYIE: No I left them there.
MR. STREET: You left them there.
MR. OSEI-AFRIYIE: Yeah I gave them to the father to be given to the daughter.
MR. STREET: To the daughter you knew was't your daughter?
MR. OSEI-AFRIYIE: Yeah I didn't know at that time. If I had known do you think I would have taken the suitcase there?
MR. STREET: When did you find out this girl was not your daughter?

.....

THE COURT: What evidence is there in this record that Ms. Ampofoh went to anyone with a bottle of schnapps or otherwise to which she acquired this real estate herself? What evidence is there in this record?

MR. OSEI-AFRIYIE: Herself. As I explained we don't do that. If I want to build a house now I send money to Ghana and my parents can do that. They go to the chief. They go and show them. And then tell you, the land you want.

THE COURT: But the testimony that I have heard with regard to the acquisition of this property is that her father acquired it.

MR. OSEI-AFRIYIE: No that is what she is sending money to her father to go to the chief to do that. That is how we do it. And where did the money come from. The money was from marital property. Okay if it was a gift the the(unable to understand words) has to be taken into account.

THE COURT: Are you arguing to me that if she sends the money and her father goes to the chief that the chief is going to recognize that she owns the property and not her father and...

MR. OSEI-AFRIYIE: That is how they do it. You go there and you tell the chief that my daughter or my son, like they'll mention my name Osei okay in the U.S. wants to build a house and go and show us the land. That's is how they do it. And the the chief will appoint someone to

take you to the bush and show you the property.

THE COURT: And you are arguing it under Ghana law that her father has no ownership interest...

MR. OSEI-AFRIYIE: Oh no no no. The village looks, the father doesn't have an ownership interest. All the father has, they try to help your children overseas to acquire property in Ghana. The father has his own house. He's got his own house even with family. As a matter of fact now he has moved to the village. And the parents take pride in it, they takes pride for helping your children overseas acquire properties. You see them mention on the street, oh this house belongs to my daughter. And in other words they say oh your daughter is doing pretty good. Well she has testified in Court that she's been sending money to get the house completed. And she has also testified that it is her house. She's denied that it is her house. She's denyiny. Your Honor, in the cross examination I asked the respondent whether or not she has a building in Ghana. She says she doesn't have any building in Ghana. Then I have her come to the desk and then show her the letter and then she read it into evidence that, indeed, she has a house in Ghana...

.....

MR. STREET: ... We would like to be awarded the marital home and we will

adopt the , well we have adopted the statement of value and the balance and the mortgage. We would suggest that the sale costs and capital gains tax either be inputted or be excluded on all the properties to be consistent. We would also ask the Court to award properties #17 &25, the rental properties for reasons I'll explain and cash buyouts a little bit later. The bank accounts, pensions and deferred compensation accounts values if you will, well I strike that, they have different values. We suggest the values should not be apportioned or offset in anyway. Because it is clear from testimony unrebutted, I would remind the Court, that the contributions to the pension plan, the deferred compensation plan and the amounts retained in savings and bank accounts were because of individual efforts at savings of spending money by individual accounts throughout the entire history of this marriage. The Court should not be tempted to be pulled back into the marriage for years, even decades, to second guess spending habits when nobody was second guessing their own spending habits. They were following an agreement they made. That part of the testimony was essentially unrebutted that there were individual accounts throughout the marriage although some of the testimony about when there joint accounts from time to time... Mrs. Ampofoh should be awarded greater than 50% and the way

saved. She was more frugal than Mr. Osei-Afriyie. Also unrebutted was her description of the medical that Mr. Osei-Afriyie has graded a lot of concerns about his future. The interesting part is that the house bill he showed to Your Honor showed that the sunset time period was to be extended. And whether or not it's going to be extended again, he naturally is fearful as an employee but its purely speculative as to whether it may or may not. And if it is in fact sunsetted, it is pure speculation but for some reason he won't be able to find equivalent paying work...As far as the expenses involving Ghana even though Your Honor has ruled that the property itself is not marital property, Your Honor has ruled that the contributions made will be taken into consideration for at least at that point of your Honor's ruling. We suggest that the consideration that should be given to those monies should be zero...

.....